

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAYSON R. MOORE
Claimant

VS.

ENVIRONMENTAL AUDIT & COMPLIANCE
Respondent

AND

CONTINENTAL WESTERN INS. CO.
Insurance Carrier

Docket No. 1,036,585

ORDER

Both parties request review of the October 29, 2007 preliminary hearing Order entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

The Administrative Law Judge (ALJ) found that claimant's accident "likely aggravated pre-existing conditions in claimant's back" and therefore directed respondent to provide treatment with Dr. Striebinger, the physician that had previously treated claimant.¹ The ALJ did not award temporary total disability (TTD) benefits although the uncontroverted evidence suggests that he is presently unable to work.

Both parties have appealed this Order. Respondent and its insurance carrier (respondent) assert that the ALJ erred in concluding that claimant sustained an injury arising out of and in the course of his employment for respondent. In sum, respondent maintains that claimant is dishonest as it relates to the extent of his preexisting back problems and therefore his allegation of an accidental injury on August 31, 2007 cannot be accepted as true. Thus, the ALJ should have concluded that claimant failed to meet his burden of proof of establishing a compensable injury and deny compensation.

¹ ALJ Order (Oct. 29, 2007).

Claimant has also appealed this order and alleges the ALJ erred in failing to award TTD benefits after correctly concluding that claimant sustained a compensable injury. Claimant also maintains that the ALJ should have awarded the unauthorized medical allowance of \$500.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

In 2006, claimant underwent a surgical procedure to fuse his spine at T6-7. Although released to return to work, claimant was still receiving treatment for that condition and in mid-August, just before beginning his job with respondent, was seen by Dr. Broxterman. During this visit, claimant expressed the beginnings of problems in his low back. Dr. Broxterman suggested claimant might have to have surgery at some point in the future to address those complaints. Claimant was not interested in further surgery until the point at which he had secured private insurance through his job with respondent. Immediately thereafter claimant began his job with respondent as a truck driver.

Claimant testified that on August 31, 2007, he was in the process of unloading debris at the assigned location when he got out of the truck, he stepped down but slipped off the bottom rung of the ladder, falling 14-16 inches to the ground, landing on his feet. Claimant indicated that he immediately had pain symptoms in his neck and low back, both areas where he had not had pain previously. Claimant did not say anything to his employer on that day, although according to respondent's owner, Brenda Grismore, the two saw each other several times that day.

On September 4, 2007 claimant reported his injury to respondent and sought medical treatment. Respondent's secretary suggested claimant could go anywhere and he presented to a local emergency room where he was medicated and dismissed, with a referral to his own physician. Claimant then sought treatment with Dr. Broxterman on September 10, 2006 and reported "chronic thoracic and lumbar back pain" along with a "recurrent injury to his neck and low back" which began "ten days ago when he fell off the bottom step of a dump truck that he was standing on at work".²

Respondent adamantly maintains that claimant did not sustain an injury on August 31, 2007. In support of this denial, respondent points to claimant's preliminary hearing testimony where claimant disclosed his preexisting thoracic problems and surgery, but denied any other back complaints. In other words, claimant was dishonest in describing his preexisting back problems and so his testimony cannot be believed.

² P.H. Trans., Ex. 1 at 5 (Dr. Broxterman's 9-10-07 office record).

Although when taken in bits in pieces it might appear that claimant only disclosed his mid-back problems, when the entire transcript is reviewed it is clear that claimant acknowledges the recent onset of low back problems just before he began working for respondent. However, his testimony is uncontroverted that after falling off the last step from his truck, he felt an immediate onset of low back *and neck* pain and the low back complaints have progressed into his right leg and down into his knee. These neck complaints had not been made before August 31, 2007.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁴

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁵

The ALJ concluded claimant had aggravated his preexisting condition, an event that is compensable under Kansas law.⁶ After considering the record as a whole, this Board Member believes the ALJ’s Order should be affirmed. There is no dispute that claimant has a preexisting condition at work in his spine. But the existence of that condition does not disqualify him from receiving benefits under the Act. And like the ALJ, this Board Member does not find claimant was particularly deceptive in his testimony. Claimant acknowledged his surgery and ongoing treatment, including his low back pain. While he did not volunteer this information on direct, nonetheless he acknowledged the contents of the medical records and his complaints. Taken as a whole, the claimant does not come across as evasive or less than forthright. Moreover, claimant’s physical complaints are now far more severe, expanding into the right leg and knee and now include his neck. Up until this accident, he had not had any radiating leg pain or complaints in his neck. Thus, it is clear that there has been a physical change which has caused, at a minimum, a temporary condition and need for treatment. Thus, the ALJ’s preliminary hearing Order is affirmed.

³ K.S.A. 2006 Supp. 44-501(a).

⁴ K.S.A. 2006 Supp. 44-508(g).

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

⁶ K.S.A. 2006 Supp. 44-508(d)(2).

While claimant has appealed this Order as well, the Board has no jurisdiction over the ALJ's failure to award temporary total disability and unauthorized medical benefits. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.⁷

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁸ The awarding of TTD benefits is not an issue over which there is jurisdiction at this juncture of the claim. The ALJ has sole authority to grant or deny such benefits following a preliminary hearing. And there is no allegation that the ALJ exceeded his jurisdiction in *not* awarding TTD or unauthorized medical benefits.⁹ Accordingly, claimant's appeal is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁰ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Robert H. Foerschler dated

⁷ See K.S.A. 2006 Supp. 44-551.

⁸ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁹ Admittedly this appears to have been an oversight by the ALJ as he comments on the rate of TTD and the date TTD would likely begin. Nonetheless, the Order contains no such provision and there is no jurisdiction over this issue at this point in time.

¹⁰ K.S.A. 44-534a.

October 29, 2007, is affirmed in all respects and claimant's appeal in this matter is dismissed.

IT IS SO ORDERED.

Dated this _____ day of January, 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Steven J. Quinn, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge